United States Court of Appeals for the Second Circuit



APPENDIX



APPENDIX

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State of New York
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New York, New York 10047
Tel. No. (212) 488-3394

1. Hamme



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75 Giv. 3631 AZZARO VS HARNETT ETC. METZNER, J.

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SUMMONS

United States Vistrict Court 1975 FOR THE SOUTHERN DISTRICT OF NEW YORK INSURANCE,

SUMMONS IN A CIVIL ACTION

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CIVIL ACTION FILE No.

45 CIV. 3631

(Formerly D. C. Form No.45a Rev. (6-19))

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund

R Issol A SAMO. A DORAGONIA OCERP Retraction of serial services. BOUNTEDEN S Plaintiff's 3 To THOMAS A CHARNETT has S
Thsurance of the State of ον Γυπτουρο Βαπα Plaintiff 000 Defendant

SUMMONS

To the a	bove named	Defen	ant
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You are hereby summoned and required to serv	won COHEN, WEISS and SIMON
Note:Mildavit, required only if pervice is much by a was-	sec than a United season Morehit or his Depart
(abat)	
plaintiff's attorney a, whose address is 605 Third	Avenue, New York, N. Y. 10016
Substratived and envolve to before me, a	this

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Denuty Clerk

Date: July 24, 1975

[Seal of Court]

NOTE: This summons is issued pursuant to Rule 4 of the Pederal Rules of Civil Procedure. : . .

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GELOW: ON ACCOMMON

HAROID D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund

75 Civ.

Plaintiffs

COMPLAINT

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York

Defendant

The plaintiffs by Cohen, Weiss and Simon, their attorneys, complaining of the defendant allege:

- 1. Jurisdiction of this Court arises out of and is based upon Sections 502 and 514 of the Employees Retirement Income Security Act of 1974, hereinafter ERISA, and also arises out of and is based upon 28 U.S.C. Section 2201 and also arises out of and is based upon 28 U.S.C. Section 2283.
- 2. The plaintiffs, Harold D. Azzaro, Samuel Gallo, Gerald Handley, Samuel Rubin, Ben Ciliberto and Jack Schuman, hereinafter the Trustees, are the trustees of Bakery Drivers Local 802 Pension Fund, hereinafter the Pension Fund, which is a pension trust fund established pursuant to and in accordance with the requirements of Section 302 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. Section 186.
- 3. The Pension Fund is an employee benefit plan established and maintained by employers engaged in commerce

manifestion managentine employees

engaged in commerce and in an industry and activity affecting commerce within the meaning of Section 4(a) of ERISA. 4. The Pension Fund has an office and regular place of business at 41-20 Crescent Street, in the County of Queens, City and State of New York. 5. The defendant, Thomas A. Harnett is Superintendent of Insurance of the State of New York and has an office and regular place of business at 2 World Trade Center, in the City, County and State of New York. 6. On or about April 25, 1975 the defendant, acting through George Perla, an Associate Insurance Examiner of the Insurance Department of the State of New York, wrote to the Trustees requesting detailed information concerning the status with respect to pension benefits of one Seymour Eskowitz and also requesting a copy of the latest benefit booklet of the Pension Fund. 7. On or about June 2, 1975 the Trustees answered the defendant in writing, stating that the defendant's letter of April 25 was the first occasion that this matter was brought to the attention of the Trustees, and requesting information as to the basis for the jurisdiction of the New York State Insurance Department in view of the fact that Section 514 of ERISA provides that the federal law supersedes state law except as to any cause of action which arose or any act or omission which occurred before January 1, 1975. 8. On or about June 5, 1975 the defendant answered the Trustees in writing, stating that ERISA provides that the state retains jurisdiction as to any cause of action

January 1, 1975, and further stating "Inasmuch as almost all of Mr. Eskowitz's credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter. Therefore please furnish a reply to our April 25, 1975 inquiry."

9. On or about June 11, 1975 the Trustees through their legal counsel answered the defendant in writing stating:

"It is the opinion of this office that the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a 'cause of action which arose, or any act or omission which occurred, before January 1, 1975' within the meaning of Section 514 of ERISA. Otherwise the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975."

10. On or about July 2, 1975 the defendant wrote to the Trustees through Sidney B. (aser, Associate Counsel, stating that he did not agree with the position of the Trustees, and forwarding a copy of the opinion of New York State Attorney General Lefkowitz, and concluding as follows:

"Accordingly, I would appreciate your and the Trustees' reconsideration of their refusal to respond to the Superintendent's inquiry. I would point out, that Section 37-h of the Insurance Law provides that trustees of any employee welfare fund must respond promptly and truthfully to the Superintendent's inquiry concerning their fund's transactions or any matter connected therewith.

"If the subject fund's Trustees' position remains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law pursuant to the provisions of Section 37-1(6) which can result in the imposition of penalties not to exceed \$2,500 upon trustees and/or their removal from office. or both such negalty and removal "

complaint.

7a

- 11. The Trustees answered the defendant on July 24, 1975, stating that upon advise of their legal counsel they were adhering to their position as previously stated.
- 12. The Trustees fear and expect that without the intervention of this Court they will be subjected to criminal or quasi-criminal prosecution before the courts of the State of New York, as threatened in the defendant's letter attached hereto as Exhibit A.
- of any cause of action which arose or any act or omission which occurred prior to January 1, 1975, within the meaning of ERISA Section 514, and the Trustees have no knowledge or information that such a cause of action arose or that such an act or omission occurred.
- 14. No claim was made by Seymour Eskowitz against the Trustees and no dispute existed between Seymour Eskowitz and the Trustees at any time prior to January 1, 1975.
- 15. The alleged earning or accumulation of pension credits by an employee prior to January 1, 1975 does not of itself constitute a cause of action which arose or an act or omission which occurred prior to January 1, 1975 within the meaning of ERISA Section 514.

obligations fully and faithfully but do not wish to be subjected to unlawful harassment and criminal prosecution and do not wish to be subjected to duplicate scate and federal regulations unless required by law.

17. The subject matter of this action is solely within the jurisdiction of the federal government and of the federal courts.

18. The plaintiffs request a declaratory judgment declaring their rights and obligations in regard to the subject matter of this action pursuant to 28 U.S.C. Section 2201.

irreparable injury by being subjected to criminal prosecution in the courts of the State of New York unless a preliminary injunction as well as a permanent injunction is granted by this Court enjoining the enforcement of Article 3-a of the Insurance Law of the State of New York with respect to the subject matter of this action.

WHEREFORE the plaintiffs demand judgment

(a) Granting a preliminary injunction and a permanent injunction enjoining the defendant. Thomas A. Harnett as Superintendent of Insurance of the State of New York, and all persons acting under his authority, direction or control, from instituting or maintaining any criminal prosecution or any civil action or proceeding against the plaintiffs by reason of any alleged violation of the

- (b) Declaring the rights and obligations of the plaintiffs in regard to the subject matter of this action.
- (c) Granting such other relief as may be proper and necessary herein.

COHEN, WEISS and SIMON

By SAMUEL T. COHEN
(A Member of the Firm)

Attorneys for Plaintiffs Office and P. O. Address 605 Third Avenue New York, N.Y. 10016 MU 2-6077

Dated: New York, N.Y. July 24, 1975.



RECEIVED

JUL - 3 1975

STATE OF NEW YORK
INSURANCE DEPARTMENT
TWO WORLD TRADE CENTER
NEW YORK 10047

CONST WEISS AND SIMON

Thomas A. Harnett

July 2, 1975

Samuel J. Cohen, Esq. Cohen, Weiss & Simon 605 Third Avenue New York, N. Y. 10016

Re: Seymour Eskowitz

Bakery Drivers Local 802 Pension Fund
41-20 Crescent Street
Long Island City, New York 11101

Dear Mr. Cohen:

This is in reference to this Department's inquiry concerning the captioned participant's pension credits to which you have responded on behalf of your client, the captioned registered employee welfare fund, to the effect that it is your opinion that this Department has been pre-empted by the federal Employee Retirement Income Security Act of 1974 (ERISA).

Though you are aware of Section 514(b) of ERISA which provides that the pre-emption ". . . shall not apply with respect to any course of action which arose, or any act or omission which occurred, before January 1, 1975," it is your opinion that the subject fund Trustees need not reply to the Superintendent of Insurance's inquiry concerning their actions or omissions with respect to the crediting of pension service prior to the said cut-off date. I do not agree with your position and for your information, I am enclosing a copy of New York State Attorney General Lefkovitz's opinion dated January 21, 1975 which states in pertinent part as follows:

"It is clear from the foregoing that the State Law and the Federal Act are based upon the same policy and contain the same objectives. It also seems clear that by virtue of the specific language

of section 514 of the Federal Act, the provisions of the Federal Act are not intended to supersede the provisions of the Banking Law and the Insurance Law with respect to any cause of action which arose or any act or omission which occurred prior to January 1, 1975. This plain language of the Federal Act read together with the declaration of policy upon which it is based compels the conclusion that while the State Law is superseded by the Federal Act as to matters arising or occurring subsequent to January 1, 1975, it remains viable and in effect as to any matters which arose or occurred prior thereto. Such can be the only logical conclusion in order that. the interests of employees and their beneficiaries shall be adequately protected. It should also follow that the ancillary provisions of Article 2-A of the Banking Law and Article 3-A of the Insurance Law. such as Banking Law, 865 (examinations; expenses) and Insurance Law, 837-f (examinations; expenses), also survive the enactment of the Federal Act in order to effectuate and implement the provisions of the State law which, by the terms of the Federal Act, survive as to any cause of action which arose or any act which occurred prior to January 1, 1975."

Accordingly, I would appreciate your and the Trustees' reconsideration of their refusal to respond to the Superintendent's inquiry. I would point out, that Section 37-h of the Insurance Law provides that trustees of any employee welfare fund must respond promptly and truthfully to the Superintendent's inquiry concerning their fund's transactions or any matter connected therewith.

If the subject fund's Trustees' position remains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law pursuant to the provisions of Section 37-1(6) which can result in the imposition of penalties not to exceed \$2,500 upon trustees and/or their removal from office, or both such penalty and removal.

Yours very truly,

Sidney B. Glaser Associate Counsel

.SBG:lm

Enc.

Cc: Trustees
Bakery Drivers Local 802 Pension Fund
41-20 Crescent Street
Long Island City, N. Y. 11101

David Hoff
Martin E. Segal Company
730 Fifth Avenue
New York, N. Y. 10019



DEPARTMENT OF LAW

ALBANY 12224

LOUIS J. LEFKOWITZ

January 21, 1975

Hon. Benjamin R. Schenck Superintendent of Insurance New York State Insurance Department 2 World Trade Center New York, New York 10047

Hon. Eliot N. Vestner, Jr.
Superintendent of Banks
New York State Banking Department
2 World Trade Center
New York, New York 10047

Gentlemen:

This is in reply to your joint request for my opinion concerning the extent of the pre-emption of the regulatory and supervisory duties of the New York State Insurance Department, under Insurance Law, Article 3-A, and of the New York State Banking Department, under Banking Law, Article 2-A, by virtue of the enactment by the United States Congress of the Employee Retirement Income Security Act of 1974 (Public Law, 93-406).

as leaving the said Manking and Insurance Law articles applicable with respect to acts or omissions which occurred prior to January 1, 1975 and you ask whether the Banking and Insurance Departments may investigate into the affairs of employee welfare funds after

Hon. Benjamin R. Schenck Hon. Eliot N. Vestner, Jr.

January 1, 1975 with respect to matters arising prior thereto. You also ask, in the event that the answer to the previous question is in the affirmative, whether all the provisions of the above-mentioned articles are applicable to such investigations including the right to assess the funds for the expenses of examinations or investigations.

Banking Law, Article 2-A and Insurance Law, Article 3-A contain identical declarations of policy. Each statute declares that employee welfare funds are a great benefit to employees and their families, that the funds vitally affect the well-being of people and that the funds should be supervised by the State to protect the rights of employees and their families (Banking Law, § 60; Insurance Law, § 37; see also McKay, et al. v. Stewart, 29 N Y 2d 563, cert. den. 405 U. S. 1040). Similarly, the Federal Act declares that it is the policy of the Federal Government to protect the interests of participants in employee benefit plans and their beneficiaries (P. L. 93-406, § 2[b]; see also, House Report No. 93-533, Part I and Senate Report No. 93-383, Part II).

The coverage of the Federal Act is described in section 4 thereof. In general, the act covers employee benefit plans which are established or maintained as described in said section. Governmental plans are specifically excluded as are church plans. Section 414 of the Federal Act states that part 4 of the Federal Act, pertaining to Fiduciary Responsibility, shall take effect on January 1, 1975 with certain limited exceptions which are enumerated therein.

Section 514 of the Federal Act provides in part as follows:

"(a) Except as provided in subsection
(b) of this section, the provisions
of this title and title IV shall
supersede any and all State Laws
insofar as they may now or

Hon. Benjamin R. Schenck Hon. Eliot N. Vestner, Jr. -3-

hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975." (Emphasis added.)

It is clear from the foregoing that the State Law and the Federal Act are based upon the same policy and contain the same objectives. It also seems clear that by virtue of the specific language of section 514 of the Federal Act (quoted above), the provisions of the Federal Act are not intended to supersede the provisions of the Banking Law and the Insurance Law with respect to any cause of action which arose or any act or omission which occurred prior to January 1, 1975. This plain language of the Federal Act read together with the declaration of policy upon which it is based compels the conclusion that while the State Law is superseded by the Federal Act as to matters arising or occurring subsequent to January I, 1975, it remains viable and in effect as to any matters which arose or occurred prior thereto. Such can be the only logical conclusion in order that the interests of employees and their beneficiaries shall be adequately protected. It should also follow that the ancillary provisions of Article 2-A of the Banking Law and Article 3-A of the Insurance Law, such as Banking Law, § 65 (examinations; expenses) and Insurance Law, § 37-f (examinations; expenses), also survive the enactment of the Federal Act in order to effectuate and implement the provisions of the State law which, by the terms of the Federal Act, survive as to any cause of action which arose or any act which occurred prior to January 1, 1975.

While I believe the foregoing to be a valid general expression of the situation which now exists, I must caution you that because of the complexity of the law and due to the many and varied problems which may exist each question which arises as to the applicability of the Federal Act exception will necessarily have to be dealt with on the basis of its own facts.

tery truly yours

LOUIS J. LEPKOWITZ Attorney General HAROLD D. AZZARO, SAMUEL GALLO, GERALD
HANDLEY, SAMUEL RUBIN, BEN CILIBERTO
and JACK SCHUMAN, as Trustees of Bakery
Drivers Local 802 Pension Fund

ANSWER

Plaintiffs

75-6,13631

v.

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York

Defendant

Defendant, by his attorney LOUIS J. LEFKOWITZ, Attorney General of the State of New York, answering the complaint herein alleges:

FIRST: Denies the allegation contained in paragraphs "13", "14", "15", "17", and "19".

AS A FIRST AFFIRMATIVE DEFENSE

SECOND: By virtue of Sec. 514(b)(1) of the Pension

Reform Act of 1974 the State of New York retained jurisdiction over any act or omission of Plaintiffs which occurred before

January 1, 1975.

THIRD: That the subject matter under investigation herein deals with the investigation of such alleged acts or omissions.

WHEREFORE, defendant demands judgment

(a) Denying a preliminary and permanent injunction as sought in the complaint.

- (b) Declaring the rights and obligations of the defendant in regard to the subject matter of this action.
- (c) Dismissing the complaint.

Dated: New York, New York September 22, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
THOMAS A. HARNETT,
Superintendent of Insurance
By:

MORTIMER SATTLER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel: (212) 488-3441

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL BUBIN, BEN CILLBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Pand,

Plaintiffs.

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant.

NOTICE OF MOTION FOR SUMMARY JUDGMENT

75 Civ. 3631 (CMM)

(Oral Argument Requested)

PLEASE TAKE NOTICE, that the undersigned will move this Court at Room 2201, United States District Court House, Foley Square, Borough of Manhattan, City of New York, on the 5th day of February, 1976 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of the General Rules of this Court, for the entry of summary judgment in plaintiffs' favor for the relief demanded in the Complaint on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) the pleadings and the exhibits attached thereto;
- (b) the annexed Statement of Material Facts
 pursuant to Rule 9(g) of this Court;
- (c) the annexed affidavits of Samuel J. Cohen and Joan Norton and the exhibits attached thereto; and

(d) plaintiffs' memorandum of law in support of their motion for summary judgment.

Dated: New York, New York January 16, 1976

> COHEN, WEISS AND SIMON Attorneys for Plaintiffs 605 Third Avenue New York, New York 10016 Tel. (212) 682-6077

ove Houng Miss

the Firm

A Member of

TO:

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Two World Trade Center
New York, New York 10047

Att: Mortimer Sattler, Esq.
Department of Law

AFFIDAVIT OF JOAN NORTON 12/18/75

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD D. AZZARO, SAMUEL CALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund

Plaintiffs,

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York

Defendant.

AFFIDAVIT

75 Civ. 3631 (CMM)

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JOAN NORTON, being duly swcrn, deposes and says:

- 1. I am the Office Manager of the Bakery Drivers Local 802 Pension Fund ("the Pension Fund"). This affidavit is submitted in support of plaintiffs' motion for summary judgment herein.
- 2. As Office Manager of the Pension Fund, I am familian with the facts relating to this action.
- 3. As Office Manager of the Pension Fund, in accordance with the instructions of the Trustees, I receive pension applications and all correspondence pertaining to the Pension Fund.

- 4. On or about April 25, 1975, I received a letter dated April 25, 1975 from George Porla, an Associate Insurance Examiner of the Pension, Non-Profit Plans Bureau of the Insurance Department of the State of New York ("the Insurance Department") addressed to the Trustees of the Pension Fund. A copy of the letter is attached hereto as Exhibit "A".
- 5. Prior to receipt of the above letter, no claim or communication of any kind concerning Seymour Eskowitz was received by the Pension Fund Office or by the Trustees, and no dispute or controversy of any nature existed between Eskowitz and the Pension Fund.
- 6. Prior to a meeting of the Trustees on July 23, 1975 at which the Eskowitz matter was considered, I received copies of correspondence pertaining to this matter from Cohen, Weiss and Simon, the attorneys of the Pension Fund. Copies of this correspondence are attached hereto as Exhibits "A" through "G". This correspondence was available to the Trustees at a July 23, 1975 meeting of the Pension Fund officers at which the Eskowitz matter was considered.
- 7. On July 24, 1975, on behalf of the Trustees, I notified George Perla that the Trustees had "decided to adhere to their position as previously stated, on the ground of the exclusive jurisdiction of the federal government." A copy

of my letter is attached hereto as Exhibit "H".

to requests by the Insurance Department of the State of New York for information pertaining to the Pension Fund or to individual pension plan participants where the sole basis for such requests is the earning or accumulation of pension credit, prior to January 1, 1975, and I have not provided any such information to the Insurance Department.

Dated: New York, New York December 18, 1975

JOAN NORTON

Sworn to before me this 19 day of December, 1975

_Notary Public

23a STATE OF NEW YORK INSURANCE DEPARTMENT 2 World Trade Center New York, New York 10047 April 25, 1975 Trustees Bakery Drivers Local 802 Pension Fund 41-20 Crescent Street Long Island City, New York 11101 Seymour Eskowitz Social Security #11.9-18-7370 Date of Birth - 4/9/26 Gentlemen: The above named has made inquiry concerning his status with respect to pension benefits. Mr. Eskowitz stated that prior to his employment under your jurisdiction, he had been employed under the jurisdiction of another Teamster local union for one year. Please advise us in detail of the facts relating to this matter including the following: 1. A summary of the member's work record. 2. The effect his employment under the jurisdiction of another Teamster local has on his status and the reasons therefor. 3. Any provisions for vesting; if so, the effect it has on Mr. Eskowitz's status. The specific plan provisions applicable to the situation of this individual. In addition, kindly submit a copy of your latest benefit booklet. Your prompt attention will be appreciated. Very truly yours, George Perla CP:hp Associate Insurance Examiner In reply, refer to: File No. P232-802 (ML) Pension, Non-Profit Plans Bureau EXHIBIT "A"

urity 514 of ERISA provides that the federal law supersedes state law except as to "any cause of action which arose, or any act or omission which becurred, before January 1, 1975."

As soon as I am advised as to the basis of your jurisdiction I shall take this matter up with the Trustees.

Very truly yours,

SJC:MN

cc: Fund Office

Mr. David A. Hoff

Samuel J. Cohen

in this matter."

It is the opinion of this office that the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a "cause of action which arose, or any act or omission which occurred, before January 1, 1975" within the meaning of Section 514 of ERISA. Otherwise the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975.

Very truly yours,

SJC/rd

Samuel J. Cohen

cc: Fund Office, Local 802 Mr. David Hoff, Martin E. Segal Co.

EXHIBIT "D"

EXHIBIT E reproduced at pages 10a - 15a, supra

July 9, 1975

Sidney B. Glaser, Esq.
Associate Counsel
New York State Insurance Department
2 World Trade Center
New York, N. Y. 10047

Re: Seymour Eskowitz
File No. P232-802 (ML)
Bakery Drivers Local 802 Pension Fund

. Dear Sir:

I have your letter of July 2. The next meeting of the Trustees is scheduled to be held on July 17. Your letter will be put before the Trustees at that time.

Very truly yours,

. Samuel J. Cohen

.SJC:MN cc: Fund Office

July 15, 1975

Sidney B. Glaser, Esq.
Associate Counsel
New York State Insurance Department
2 World Trade Center
New York, N. Y. 10047

Re: Seymour Eskowitz
File No. 1232-802 (ML)
Bakery Drivers Local 802 Pension Fund

Dear Sir:

This is to notify you that the meeting of the Trustees of the above Fund previously scheduled to be held on July 17 has been postponed until July 23.

I shall advise you of the Trustees decision shortly thereafter.

Very truly yours,

Samuel J. Cohen

SJC:MN

cc: Fund Office

KERY DRIVERS LOCAL 802 308 (welfare and pension funds 41-20 CRESCENT STREET LONG ISLAND CITY, N.Y. 11101 EMpire 1-8820 July 24, 1975 Mr. George Perla Associate Insurance Examiner Pension, Non-Profit Plans Bureau New York State Insurance Dept. 2 World Trade Center New York, N. Y. 10047 RE: Seymour Eskowitz Bakery Driver's Local 802 Pension Fund File No. P232-802 (ML) Dear Mr. Perla: I am writing to you on behalf of the Trustees of the above Fund. After full consideration of this matter, and consultation with legal counsel, the Trustees have decided to adhere to their position as previously stated, on the ground of the exclusive jurisdiction of the federal government. Very truly yours, Joan Norton Fund Manager JN/1b:

AFFIDAVIT OF SAMUEL J. COHEN 1/5/76

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund

Plaintiffs,

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York

Defendant.

AFFIDAVIT
75 Civ. 3631 (CMM)

STATE OF NEW YORK) : ss.:

SAMUEL J. COHEN, being duly sworn, deposes and says:

- 1. I am a member of Cohen, Weiss and Simon, attorneys for the Trustees of the Bakery Drivers Local 802 Pension Fund, the plaintiffs herein ("the Trustees" and "the Pension Fund"). This affidavit is submitted in support of plaintiffs' motion for summary judgment.
- 2. In April, 1975, the Trustees of the Pension Fund received a letter dated April 25, 1975 from George Perla,

an Associate Insurance Examiner with the Pension, Non-Profit
Plans Bureau of the Insurance Department of the State of New
York ("the Insurance Department"). A copy of this letter, attached
hereto as Exhibit "A", was forwarded to me by the Trustees
shortly thereafter.

- 3. As shown by the copy attached as Exhibit "A", the letter requests that the Trustees provide detailed information concerning the pension benefit status of Seymour Eskowitz including: a summary of his work record; a statement by the Trustees as to the effect of his employment by another Teamster local upon his pension status and the reasons for this effect; any provisions concerning the vesting of benefits and a statement as to the effect of any applicable vesting provision upon his pension status. The letter also requests a copy of the latest Pension Fund benefit booklet.
- 4. On June 2, 1975, I replied on behalf of the Trustees to the April 25, 1975 letter of George Perla. A copy of my letter dated June 2, 1975 is attached hereto as Exhibit "B".
- 5. As shown by the copy attached as Exhibit "B", I stated that Perla's letter of April 25, 1975 was the first occasion that the matter of Seymour Eskowitz had been brought to the attention of the Trustees. I requested that Perla advise the Trustees of the basis of jurisdiction of the Insurance Department for requesting information from the Trustees of the Pension Fund concerning Seymour Eskowitz in view of the fact

that Section 514 of the Employment Retirement Income Security
Act ("ERISA") provides that:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

- (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."
- 6. On June 6, 1975, I received a letter dated June 5, 1975 from John P. Gemma, Acting Superintendent of Insurance, by George Perla, replying to my letter of June 2, 1975. A copy of this letter is attached hereto as Exhibit "C".
- 7. As shown by the copy attached as Exhibit "C", the Trustees were again requested to provide the detailed information requested by Perla's letter of April 25, 1975. The letter further stated that the jurisdiction of the Insurance Department had not been superseded with respect to Seymour Eskowitz because it retains jurisdiction under ERISA as to any "cause of action which arose, or act or omission which occurred" before January 1, 1975, and that "[i]nasmuch as almost all of Mr. Eskowitz's pension credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter."

- 8. On June 11, 1975, on behalf of the Trustees, I answered this letter. A copy of my answering letter is attached hereto as Exhibit "D".
- 9. A copy of the booklet which contains a description of the pension plan administered by the Trustees, issued by them May 1, 1970, is attached hereto as Exhibit "E". The Court will note upon examination of the plan that it provides for "normal" pension benefits at age 65 after 25 years of service (p. 4; p. 16 Article V, Section 2). It also provides for a "service" pension based upon 35 years of service regardless of age (p. 4; p. 18 Article V, Section 14). Minimum pension benefits available under provisions for "reduced", "early retirement", and "disability" pension benefits require no less than 15 years of service (p. 4; pp. 16-17 Article V, Sections 4, 6, 8).
- Department were to be adopted, that state agency would continue to have jurisdiction over claims for 15 to 35 years after January 1, 1975 in relation to a mere inquiry made after that date as to any employee who commenced work prior to January 1, 1975, regardless of the existence of any dispute or controversy prior to that date.
- ll. The pension plan of the Pension Fund administered by plaintiff Trustees is not unique. Its provisions are typical of those prevailing in pension funds throughout the country. This is shown by provisions of ERTSA which require all plans to

have minimum funding standards based on a 30-40 year period (Section 302); benefit accrual requirements based on a maximum of 33 1/3 years of participation in a plan (Section 204); and minimum vesting standards which require 100 percent vesting of minimum nonforfeitable benefits within several alternative periods of from 10-15 years (Section 203). The "normal retirement age" is defined by ERTSA Section 3(24) as age 65 or 10 years participation in the plan, whichever is later.

12. As shown by the copy of my letter dated June 11, 1975 attached as Exhibit "D", I replied to Perla that the earning of pension credit prior to January 1, 1975 does not of itself constitute a "cause of action which arose, or any act or omission which occurred before January 1, 1975" within the meaning of Section 514 of ERISA. I further stated that if the meaning of Section 514 advanced by the Insurance Department were accepted, "the jurisdiction of the various States would continue indefinitely regariless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975."

13. On July 3, 1975, I received a reply dated July 2, 1975 to my letter of June 11, 1975 from Sidney B. Glaser, Associate General Counsel to the Insurance Department. A copy of Glaser's letter is attached hereto as Exhibit "F".

14. As shown by the copy attached as Exhibit "F", this letter requests that the Trustees reconsider their position and contains the following warning:

"If the subject fund's Trustees' position recains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law pursuant to the provisions of Section 37-1(6) which can result in the imposition of penalties not to exceed \$2,800 upon trustees and/or their removal from office, or both such penalty and removal."

- 15. In order to assist the Trustees' consideration of the issue raised by Glaser's July 2, 1975 letter, I transmitted copies of all correspondence concerning the matter to them prior to their July 23, 1975 meeting. My letter of transmittal dated July 16, 1975 is attached hereto as Exhibit "G".
- July 23, 1975 meeting. At that meeting, the Trustees reviewed relevant correspondence, and indicated that they did not want to be subject to duplicate jurisdiction by the state and federal governments if that was not required by law. The Trustees asked my opinion in this matter and I replied that the earning of pension credits prior to January 1, 1975 alone is not a legally valid basis for assertion of jurisdiction by the Insurance Department, since the earning of pension credits cannot properly or meaningfully be construed as "any cause of action which arose, or any act or omission which occurred" within the meaning of Section 514 of ERISA.
- 17. On July 24, 1975, after discussing the matter with me, Joan Norton, the Office Manager of the Pension Fund,

sent a letter to the Insurance Department on behalf of the Trustees. A copy of this letter is attached hereto as Exhibit "H".

18. As shown by the copy attached as Exhibit "H", this letter stated that:

"After full consideration of this matter, and consultation with legal counsel, the Trustees have decided to adhere to their position as previously stated on the ground of the exclusive jurisdiction of the federal government."

- 19. On August 5, 1975, the Summons and Complaint in the above-captioned action, 75 Civ. 3631 (CMM), were served upon the Insurance Department. A copy of the Summons and Complaint are attached hereto as Exhibits "I" and "J" respectively.
- 20. Defendant Insurance Department answered the Complaint on September 23, 1975. A copy of the Answer is attached hereto as Exhibit "K".
- 21. It is submitted that no genuine issue exists as to any material fact, and that summary judgment is therefore appropriate.
- 22. Defendant's Answer admits all of the allegations of the Complaint, except the allegations contained in paragraphs 13, 14, 15, 17 and 19 of the Complaint, which are generally denied. The allegations generally denied raise solely legal issues.

38a

23. The only issue raised by defendant's denial of the allegations of paragraphs 13 and 14 of the Complaint concern the legal meaning of the language "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" of Section 514(b)(1) of ERISA.

24. The only issue raised by defendant's denial of the allegations of paragraph 15 of the Complaint is whether the earning or accumulation of pension credits by an employee prior to January 1, 1975 constitutes "any cause of action which arose, or any act or omission which occurred" within the meaning of Section 514 of ERISA.

25. Defendant's denial of the allegation of paragraph.

17 of the Complaint that the subject matter of this action is solely within the jurisdiction of the federal government and of the federal courts is purely a legal issue.

26. Defendant's denial of the allegations of paragraph 19 of the Complaint also requires determination of only legal issues. Defendant has threatened plaintiffs with criminal prosecution, and admits by his Answer that plaintiffs fear they will "be subjected to unlawful harassment and criminal prosecution" (Cmplt. \$16). Whether such harassment or criminal prosecution would cause plaintiffs serious and irreparable damage, and whether the proper remedy to prevent such damage is an injunction, are clearly legal issues.

- 27. Defendant's "First Affirmative Defense", "[t]hat the subject matter under investigation herein deals with the investigation of acts or omissions which occurred before January 1, 1975 within the meaning of Section 514(b)(1) of ERISA, is simply a restatement of its denial of certain of the allegations of the Complaint. It raises no genuine issue of material fact.
- 28. Upon the foregoing, no genuine issue exists as to any material fact. Summary judgment is therefore appropriate herein.

Dated: New York, New York January 5, 1976

Danniel J. Cohen

Sworn to before me

this 5th day of January, 1976.

Notary Public (

JAMES V. MORGAN
Notary Public, State of New York
No 31-4518905
Qualified in New York County
Commission Expires March 30, 19_1

EXHIBIT A reproduced at page 23a, supra.

EXHIBIT B reproduced at page 24a, supra

EXHIBIT C reproduced at page 25a, supra

EXHIBIT D reproduced at page 26a, supra

EXHIBIT F reproduced at pages 10a - 15a, supra

July 16, 1975

Bakery Drivers Local 802 Pension Fund 41-20 Crescent Street Long Island City, N. Y. 11101

Re: Bakery Drivers Local 802 Pension Fund and Seymour Eskowitz

Gentlemen:

To assist the Trustees in making a decision on this matter at the meeting to be held on July 24 I enclose copy of the correspondence between this office and the New York State Insurance Department between April 25 and July 15.

Sincerely yours,

Samuel J. Cohen

SJC:MN Enc.

cc: Trustees
Mr. David A. Hoff .

EXHIBIT H appears at page 30a, supra
EXHIBIT I appears at page 2a, supra
EXHIBIT J appears at page 4a, supra

PLAINTIFF'S STATEMENT UNDER RULE 9(g)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD D. AZZARO, SAMUEL CALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund

Plaintiffs,

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York

Defendant.

STATEMENT PURSUANT TO RULE 9(g)

75 Civ. 3631 (CMM)

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE PURSUANT TO RULE 9(g) OF THIS COURT

Plaintiffs contend that there is no genuine issue to be tried as to the following material facts:

- 1. Plaintiffs Harold D. Azzaro, Samuel Gallo, Gerald Handley, Samuel Rubin, Ben Ciliberto and Jack Schuman are Trustees of Bakery Drivers Local 802 Pension Fund ("the Trustees" and "the Pension Fund"), which is a pension trust fund established pursuant to and in accordance with the requirements of Section 302 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. Section 186.
- 2. The Pension Fund is an employee benefit plan established and maintained by employers engaged in commerce and by

an employee organization representing employees engaged in commerce and in an industry and activity affecting commerce within the meaning of Section 4(a) of ERISA.

- 3. The Pension Fund has an office and regular place of business at 41-20 Crescent Street, in the County of Queens, City and State of New York.
- 14. Defendant Thomas A. Harnett is Superintendent of Insurance of the State of New York and has an office and regular place of business at Two World Trade Center in the City, County and State of New York.
- 5. On or about April 25, 1975 the defendant, acting through George Perla, an Associate Insurance Examiner of the Insurance Department of the State of New York, wrote to the Trustees requesting detailed information concerning the status with respect to pension benefits of one Seymour Eskowitz and also requesting a copy of the latest benefit booklet of the Pension Fund.
- defendant in writing, stating that the defendant's letter of April 25 was the first occasion that this matter was brought to the attention of the Trustees, and requesting information as to the basis for the jurisdiction of the New York State Insurance Department in view of the fact that Section 514 of ERISA provides that the federal law supersedes state law except as to any cause

of action which arose or any act or omission which occurred before January 1, 1975.

- 7. On or about June 5, 1975 the defendant answered the Trustees in writing, stating that ERISA provides that the state retains jurisdiction as to any cause of action which arose or any act or omission which occurred before January 1, 1975, and further stating "Inasmuch as almost all of Mr. Eskowitz's credits were earned or accumulated prior to January 1, 1975, this Department has not been superseded in this matter. Therefore please furnish a reply to our April 25, 1975 inquiry."
- 8. On or about June 11, 1975 the Trustees through their legal counsel answered the defendant in writing, stating:

"It is the opinion of this office that the earning of Pension Credit prior to January 1, 1975 does not of itself constitute a 'cause of action which arose, or any act or omission which occurred, before January 1, 1975' within the meaning of Section 514 of ERISA. Otherwise the jurisdiction of the various States would continue indefinitely regardless of the commission of any wrongful act by the administrators of Pension Funds prior to January 1, 1975."

9. On or about July 2, 1975 the defendant wrote to the Trustees through Sidney B. Glaser, Associate Counsel, stating that he did not agree with the position of the Trustees, forwarding a copy of the opinion of New York State Attorney General Lefkowitz and concluding as follows:

"Accordingly, I would appreciate your and the Trustees' reconsideration of their refusal to respond to the Superintendent's inquiry. I would point out, that Section 37-h of the Insurance Law provides that trustees of any employee welfare fund must respond promptly and truthfully to the Superintendent's inquiry concerning their fund's transactions or any matter connected therewith.

If the subject fund's Trustees' position remains unchanged, this Department will have to consider the issuance of a Citation against them for willfully violating the Insurance Law pursuant to the provisions of Section 37-1(6) which can result in the imposition of penalties not to exceed \$2,500 upon trustees and/or their removal from office, or both such penalty and removal."

- 10. The Trustees answered the defendant on July 24, 1975, stating that upon advice of their legal counsel they were adhering to their position as previously stated.
- 11. The Trustees fear and expect that without the intervention of this Court they will be subjected to criminal or quasi-criminal prosecution before the courts of the State of New York as threatened in defendant's letter of July 2, 1975 (quoted supra in paragraph 9).
- 12. Defendant has not notified the Trustees of any cause of action which arose or any act or omission which occurred prior to January 1, 1975, within the meaning of FRISA Section 514 and the Trustees have no knowledge or information that such a cause of action arose or that such an act or omission occurred.
 - 13. No claim was made by Seymour Eskowitz against the

(a)

Trustees and no dispute existed between Seymour Eskowitz and the Trustees at any time prior to January 1, 1975.

- 14. The Trustees wish to discharge their legal obligations fully and faithfully but do not wish to be subjected to unlawful harassment and criminal prosecution and do not wish to be subjected to duplicate state and federal regulations unless required by law.
- 15. Plaintiffs request a declaratory judgment declaring their rights and obligations in regard to the subject matter of this action pursuant to 28 U.S.C. Section 2201.
- 16. Plaintiffs will suffer serious and irreparable injury by being subjected to criminal prosecution in the courts of the State of New York unless a preliminary injunction as well as a permanent injunction is granted by this Court enjoining the enforcement of Article 3-a of the Insurance Law of the State of New York with respect to the subject matter of this action.
- 17. The pension plan administered by the Trustees provides for "normal" pension benefits at age 65 after 25 years of service. The plan also provides for a "service" pension based upon 35 years of service regardless of age. Minimum pension benefits available under provisions for "reduced", "early retirement", and "disability" pension benefits require no less than 15 years of service.
- 18. If the theory of the Insurance Department were to be adopted, that agency would continue to have jurisdiction over claims for 15 to 35 years after January 1, 1975 in relation to an inquiry made after that date as to any employee who commenced

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work prior to January 1, 1975, regardless of the existence of any dispute or controversy prior to that date.

19. The provisions of the pension plan administered by the Trustees are typical of those prevailing in pension funds throughout the country.

Respectfully submitted, .

COHEN, WEISS and SIMON Attorneys for Plaintiffs 605 Third Avenue New York, New York 10016

(212) 682-6077

Dated: New York, New York January 15, 1976 Ву:

(A Member of the Firm)

HAROLD D. AZZARO, SAMUEL GALLO, GERALD: HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery: Drivers Local 802 Pension Fund,

DEFENDANT'S STATEMENT: UNDER RULE 9(g)

Plaintiffs,

-against-

75 Civ. 3631 (CMM)

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York, :

Defendant.

Defendant contends that there are issues of fact as to the following matters:

(a) the knowledge or information of the trustees regarding the accrual of any cause of action or occurrence of any act or omission prior to January 1, 1975 within the meaning of ERSA § 514. (¶12).

(b) the desire of the trustees to discharge their legal obligations (¶14).

(c) Alleged irreparable injury to plaintiffs (¶16).

Dated: New York, New York March 26, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

Sentlemen, I would like to know if your could give me the proper information about the Pennica Plan Jaw with the rested rights. It seems that irregant on the Labort & Management Brand and others, Last give me the information that I need. I would appreciate any information that you could Men.

I have been in the Bakers Terms Union Lical # 802 food the past twenty - four years. Pring to that & was with another Tunsters Union for a year which I can't recall the local number. When I transfered local I was not penalized for an initiation fie, just transfeed. how I would like to retire from the present local #802 but was told that I would love my pension berifit because I only have the twesty found years with my prisent local. I was told the year with my former local will not be benound. I would like to know if this

is so since it was a Seamsters Unice Is the present restel eights law in field effect as francis Do & have to put the other year in with my princit local or will I get the credit for the year & put in with my formed local: What will happen if my present employed closes his doors to business and goes esto benkruptry If I decide to retile after twenty you years, instead Sevaiting for the twesty-fine years, well I love my persion, or can it he pro-rated? Does the present four coverme under the rested rights? I am completely confused, as on one seems to be able to answed my quections. Cen you helpme? Hank you A remain, Very truly yours, Sugram to Kawitz

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR WASHINGTON, D.C. 20210



OCT 25 1975

Sidney B. Glaser Associate Counsel State of New York Insurance Department Two World Trade Center New York, New York 10047

Re: Azzaro v. Hartnett (S.D.N.Y. No. 75 Civ. 3631)

Dear Mr. Glaser:

A copy of the complaint in the above-captioned case was referred to me, together with your letter of September 8, 1975, to Mr. Naumoff of this Department. After reviewing the available information I have concluded that it would not be appropriate for us to become involved in this suit at the present time.

We appreciate your informing us of this litigation, and we will continue to review carefully any developments therein which you may bring to our attention.

Sincerely,

Steven J. Sacher

Associate Solicitor for

Plan Benfits Security Division

cc: James D. Hutchinson

Benjamin Naumoff William O'Laughlin

DECEIVED OFFICE OF GENERAL COUNSEL

OCT 2 8 1975

INSURANCE DEPT.



UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF JAMES V. MORGAN 4/14/76 OFF ARTMENT OF LAW OFF MAIL WEAN LOSK CITY OFFICE

HAROLD D. AZZARO, SAMUEL GALLO, CERALD HANDLEY, SAMUEL RUBIN, BEN CILIEERTO, and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs,

AFFIDAVIT

75 Civ. 3631 (CIM)

-against-

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant.

STATE OF NEW YORK) : SS.: COUNTY OF NEW YORK)

JAMES V. MORGAN, being duly sworn, deposes and says:

- 1. I am an attorney with Cohen, Weiss and Simon, attorneys for plaintiffs herein.
- 2. On March 29, 1976, I received the response of defendant in the above-captioned estion to plaintiffs! motion for summary judgment. A letter dated October 23, 1975 from Steven J. Sacher, Associate Solicitor for Plan Benefits. Security Division, Office of the Solicitor, United States Department of Labor to Sidney B. Glaser, Associate Counsel to the Insurance Department of the State of New York, is attached to defendant's statement pursuant to rule 9(g) of this Court as Exhibit "B", and is attached hereto as Exhibit "A".
 - Plaintiffs had no knowledge of the Sacher letter of October 23, 1975, of the contents thereof, or of the

Benjamin Naumoff of the Department of Labor which elicited the Sacher letter of October 23, 1975 referred to therein until March 29, 1976. Glaser's letter of September 8, 1975 is not set forth in defendant's response to plaintiffs' motion for summary judgment, nor is it described therein.

4. Defendant's memorandum of law in opposition to plaintiffs' motion for summary judgment herein states in pertinent part with respect to the Sacher letter referred to above that:

"Perhaps it is most significant in determining the scope of the State's residual jurisdiction over employee pension plans that the U.S. Department of Labor, with knowledge of the State Insurance Department's practices and with specific knowledge of the instant case has refused to interfere with the present matter. See letter from Department of Labor, Solicitors office dated October 23, 1975, annexed as Exhibit "B" to defendants' 9(g) statement.

It would appear, therefore, that the Department of Labor has come to what is, at least a tentative conclusion, that the State is not violating ERISA's preemption section [§514(a)]. As the agency responsible for enforcing ERISA, its apparent views should be given weight by this Court, particularly in the absence of any reported federal judicial interpretation of § 514(a)(b)." [citations omitted]

5. On April 5, 1976, I telephoned Assistant
Attorney General Richard S. Hammer in order to discuss the
Glaser letter of September 8, 1975 referred to in paragraph
3 supra. At my request, Assistant Attorney General Hammer
read the text of the September 8, 1975 Glaser letter to me
over the telephone. Assistant Attorney General Hammer

thereafter declined to fulfill my request that he provide plaintiffs with a copy of the Glaser letter of September 8, 1975 on the ground that the letter constitutes an internal memorandum.

- of the aforesaid telephone conversation, that the Glaser' letter of September 8, 1976 refers to a telephone conversation between Associate Counsel Glaser and Benjamin Naumoff of the Department of Labor concerning the above-captioned action, and that the letter as quoted to me by Assistant Attorney General Hammer during our April 5, 1976 telephone conversation states that Associate Counsel Glaser would appreciate "knowing if you would be interested in appearing in support of our position."
 - 7. In an effort to obtain a copy of the aforesaid Glaser letter of September 8, 1975, I telephoned Associate Solicitor Steven Sacher on or about March 31, 1976 and April 12, 1976, at the Department of Labor in Washington, D.C.
 - 8. On or about April 12, 1976, my telephone call of April 12, 1976 to Associate Solicitor Sacher was returned by Monica Gallagher, Esq., Plan Benefits Security Division, Office of the Solicitor of the United States Department of Labor. Ms. Gallagher informed me that should plaintiffs request a copy of the September 8, 1975 letter of Associate Counsel Glaser to Benjamin Naumoff, such request would be treated by the Department of Labor to be

a request pursuant to the Freedom of Information Act, and would probably be granted.

Sworn to before me this 14th day of April, 1976.

Notary Public

SUSAN C. BINDERT

Notary Public State of More York

No. 41-401199

Confident in Cusons County

Samular of Suprice March 10, 127

OPINION OF THE COURT

UNITED STATES DISTR SOUTHERN DISTRICT O	F NEW YORK	·V		
HAROLD D. AZZARO, S GERALD HANDLEY, SAM CILEBERTO and JACK Trustees of Bakery 802 Pension Fund,	AMUEL GALLO, WEL RUBIN, BEN SCHUMAN, as	:		
	Plaintiffs,	:	75 Civ.	3.631
-against-		: ,	(CMM)	
THOMAS A. HARNETT, as Superintendent of Insurance of the State of New		:		
York,		:		
	Defendant.	:		

APPEARANCES

Cohen, Weiss and Simon
Attorneys for Plaintiffs
605 Third Avenue
New York, New York 10016
Samuel J. Cohen
James V. Morgan
Of Counsel

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendant
Two World Trade Center
New York, New York 10047
Robert S. Hammer
Assistant Attorney General
Of Counsel

METZNER, D.J.:

Plaintiffs move for summary judgment in this action for declaratory and injunctive relief. Plaintiffs, trustees of Bakery Drivers Local 802 Pension Fund, seek to enjoin defendant, Superintendent of Insurance of the State of New York, from pursuit of the department's inquiry into the pension benefit status of a pension fund participant. They also seek a declaration of their rights and obligations with respect to the subject matter of this action.

Plaintiffs have refused to supply the requested information on the ground that the jurisdiction of the New York State Insurance Department has been superceded in this matter by the United States Department of Labor by virtue of the Employee Retirement Income Security Act of 1974(ERISA), 29 U.S.C. § 1001 et seq. The act provides for exclusive federal jurisdiction in the area of employee benefit plans with an exception for "any cause of action which arose, or any act or omission which occurred before January 1, 1975." 29 U.S.C. § 1144.

Pursuant to a request by the pension fund participant on March 24, 1975, the Insurance Department inquired of the plaintiffs on April 25, 1975, as to the participant's pension benefit status. When plaintiffs asked the basis of

of jurisdiction for the department's inquiry, it asserted that inasmuch as most of the member's pension credits were earned prior to January 1, 1975, the New York State Insurance Department was not superceded in this matter by ERISA.

plaintiffs continue to refuse to supply the requested information. They assert that the April 25, 1975 inquiry was the first occasion upon which they received notice of any possible controversy or dispute over the status of the pension fund member. Plaintiffs assert that if defendant prevails, the New York State Insurance Department would have continuing jurisdiction over claims by all employees who earned pension credits prior to January 1, 1975. Plaintiffs believe that they would then be subject to concurrent state and federal jurisdiction.

No genuine issue of fact exists in this action. The question of whether a state may continue to exercise supervisory jurisdiction over a pension benefit plan is a question of law to be decided by reference to ERISA and to the legislative history of that act.

The relevant statute, Section 514 of ERISA, 29 U.S.C. § 1144, provides:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this

chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...

"(b)(l) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

This legislative history of ERISA shows that

Congress intended absolute preemption of the field of

employee benefit plans. In introducing the conference

report on ERISA, Senator Harrison A. Williams, Jr., Chairman

of the Senate Committee on Labor and Public Welfare, said:

"It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." [1974] U.S. Code Cong. & Admin. News 5188-89.

Preemption of the field was intended to provide for uniform regulation of employee benefit plans. The report of the House Education and Labor Committee states:

recover benefits due to his umder the terms of his plan or to enforce his rights under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B). The Secretary of Labor has power to investigate in order to determine whether a violation of the act has occurred. 29 U.S.C. § 1134.

Section 1144(b)(1) is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975. A contrary result would create a chaotic condition in this field and violate the whole purpose of ERISA.

There is no cause of action existing prior to

January 1, 1975 involved in this case. There is no showing of
an act or omission by plaintiffs with respect to the Pension

Fund member prior to that date. The Insurance Department was
seeking to investigate the present status of the member who
wished to know if he is now credited by his pension plan for
a year's employment with another Teamsters' Union as well as
for his employment with the Bakery Drivers Union.

In order to prevent this contravention of the purpose of ERISA, the exception to federal regulation provided in Section 1144(b)(1) must be narrowly construed to limit state regulation to what is essentially a cleanup

role, that is, to the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975.

Summary judgment is entered for plaintiffs. So ordered.

Dated: New York, New York June 3, 1976

/s/ CHARLES M. METZNER U.S.D.J.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

HAROLD D. AZZARO, SAMUEL GALLO,

GERALD HANDLEY, SAMUEL RUBIN, BEN GILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs, : JUDGMENT

-against- : 75 Civ. 3631 (CMM)

THOMAS A. HARNETT, as Superintendent : of Insurance of the State of New York,

Defendant.

Plaintiffs, by their attorneys, Cohen, Weiss and Simon, having moved this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of this Court, and said motion having come on to be heard before the Honorable Charles M. Metzner, United States District Judge, on the 20th day of May, 1976.

NOW, upon reading and filing the summons dated July 24, 1975, the complaint dated July 24, 1975 and the exhibits annexed plaintiffs' statement pursuant to file 9(g) of the rules of this court, the affidavit of Samuel J. Cohen, sworn to the 5th day of January, 1976 and the exhibits annexed thereto; the affidavit of Joan Morton, sworn to the 18th day of December, 1975 and the exhibits annexed thereto; the affidavit of James W. Morgan, sworn

to the 14th day of April, 1976; plaintiffs' memorandum dated
January 15, 1976; plaintiffs' reply memorandum dated April 14,
1976 all in support of said motion; and upon defendant's answer
dated September 22, 1975; defendant's statement pursuant to Rule
9(g) of this Court dated March 26, 1976 and the exhibits annexed
thereto and defendant's memorandum of law in opposition to
plaintiffs' motion for summary judgment dated March 26, 1976 all
in opposition to said motion; and having heard Samuel J. Cohen,
of counsel for Cohen, Weiss and Simon, attorneys for plaintiffs,
and Robert S. Hammer, Assistant Attorney General of the State
of New York, of counsel for Louis J. Lefkowitz, Attorney General
of the State of New York, on behalf of defendant, and due deliberation having been had thereon; and having read and filed the
opinion of this Court dated June 4, 1976; it is upon motion of
Cohen, Weiss and Simon, attorneys for plaintiffs,

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is granted in all respects and it is further

ORDERED, ADJUDGED AND DECREED that defendant Thomas A. Harnett, as Superintendent of Insurance of the State of New York, and all persons acting under his authority, direction or control, he and hereby are enjoined from instituting or maintaining any criminal prosecution or any civil action or proceeding against the plaintiffs by reason of any alleged violation of the Insurance Law of the State of New York pertaining to Seymour Eskowitz.

Dated: New York, New York July 15, 1976

United States District Judge

Judgment Entered: 7/16/76

Clerk

STATE OF NEW YORK)

: SS.:
COUNTY OF NEW YORK }

ROBERT S. HAMMER
, being duly sworn, deposes and Attorney General
says that he is an Assistant / in the office of the Attorney
General of the State of New York, attorney for appellant
herein. On the 27th day of September, 1976, he served
the annexed upon the following named persons:

COHEN, WEISS & SIMON Attorneys for Appellees 605 Thord Avenue New York, N. Y. 10016

Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at TwoxWorldxTradexCenter,

New York, New York 10007, directed to said Attorney sat the address within the State designated by them, for that purpose.

ROBERT S. HAMMER

Sworn to before me this 28th day of September , 1976

Assistant Attorney General of the State of New York